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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ELGIN TIPLER, Plaintiff and Appellant, v. CITY OF PALMDALE, Defendant and Respondent.	B205862 (Los Angeles County Super. Ct. No. MC017966)

APPEAL from a judgment of the Superior Court of Los Angeles County. Alan S. Rosenfield, Judge. Affirmed.

Elgin Tipler, in pro. per., for Plaintiff and Appellant.

Cohen & Goldfried, Robert M. Goldfried for Defendant and Respondent .

Appellant Elgin Tipler sued respondent City of Palmdale (the City), alleging causes of action related to his departure from employment with the City. The trial court sustained the City's demurrer to the second amended complaint without leave to amend. We affirm the judgment of dismissal because Tipler's causes of action are barred by his failure to file a timely claim with the City as required by the Government Claims Act (Gov. Code, § 900 et seq.)[1] and by the statute of limitations.

FACTUAL AND PROCEDURAL SUMMARY

The City's city manager sent Tipler a letter dated August 5, 2002, notifying him that his employment with the City was terminated effective immediately. The reason for terminating Tipler's employment was that he had accessed with his computer and printed "hardcore pornographic material," which violated various City procedures and rules. The pornographic images and movie clips were on his work computer or on diskettes and color photographs in his personal work area. The pornographic material had been accessed and printed "on City time at City expense." Also, the building where Tipler worked often had children present.

As further indicated in the City's termination letter, most of Tipler's employment benefits were immediately discontinued. However, Tipler's workers' compensation benefits were continued because he had an "open claim," and his health benefits were continued through the end of the month.

Allegations in the original complaint.

In Tipler's original complaint, filed on February 28, 2007, he alleged that his employment with the City ended in the middle of 2002, and that there was a dispute over exactly how his employment ended. According to Tipler, the true reason his employment ended was that while he was on a medical leave of absence in May of 2002, he decided not to return to work because he had been diagnosed with a terminal illness. Even though he was released by his doctor to return to work in early June of 2002, he did not return and characterized the situation as having voluntarily quit his job in June of 2002.

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1 All statutory references are to the Government Code unless otherwise indicated.

As further alleged by Tipler, the City took the position that it fired him on August 5, 2002, for gross misconduct—specifically, the discovery in Tipler's office of pornographic material owned by him, a fact he admitted was true. Tipler then filed for unemployment benefits in August of 2002, because he had been fired (even though he also alleged he voluntarily quit), but he was denied unemployment benefits because it was determined that he was "terminated for misconduct." He further alleged that he was denied health insurance benefits under COBRA because the City gave the same purportedly false information about his termination to Tipler's health care provider.

The gravamen of each of the four causes of action in Tipler's original complaint was that the City erred in firing him in August of 2002 for gross misconduct, because he had already quit in June of 2002. Thus, according to Tipler, in essence the City engaged in actionable conduct by representing to others that it had fired him and in attributing his firing to misconduct.

The four specific causes of action alleged were as follows: (1) defamation, based on the City's fraudulently maintaining that it had fired Tipler (because of the pornography found in his office); (2) intentional infliction of emotional distress, based on the City's invading his privacy by entering his office, searching and seizing his personal property, placing his personal property on display for others to see (presumably, the pornography), and not returning the property to him; (3) negligent infliction of emotional distress, based on the same invasion of privacy by nonpersonnel City staff members; and (4) violation of public policy, based on creating false letters of termination, misstating facts to the state Employment Development Department regarding Tipler's claim for unemployment benefits, and maintaining a fabricated story about separation from employment.

The City demurred to the complaint on the ground, inter alia, that Tipler was required, but failed, to allege that he had filed the statutorily required government claim (see § 905) with the City. The trial court sustained the demurrer with leave to amend.

Allegations in the first amended complaint.

Tipler then filed a first amended complaint, but once again failed to allege compliance with the requirement of filing a government claim with the City. The first amended complaint contained the same basic allegations. It also alleged similar causes of action identified as defamation, intentional infliction of emotional distress, negligence, and conspiracy in violation of public policy. However, the first amended complaint also added two new causes of action based on the same underlying factual scenario and stemming from what Tipler characterized as the fraudulent employment separation created by the City in August of 2002. One new cause of action was for fraud and deceit, and the other was for conspiracy to wrongfully terminate employment in violation of public policy.

The City again demurred to the first amended complaint on the ground that Tipler had failed to allege compliance with the requirement that he file a government claim with the City. In his opposition to the demurrer, Tipler asserted that he had filed the government claim with the City. He attached to his opposition a letter dated July 13, 2005, which purported to constitute his government claim notice, and the City's reply to Tipler's letter which denied all of his allegations and noted that "statutes of limitation bar you from filing suit as you left the City's employ over three years ago." In Tipler's opposition, he also argued for the first time that the City had waived all defenses of any kind to all of the causes of action set forth in the first amended complaint by failing to advise him that his government claim notice was late, as the City was statutorily required to do.

The trial court again rejected Tipler's contentions, and for a second time sustained the City's demurrer with leave to amend.

Allegations in the second amended complaint.

Tipler then filed a second amended complaint, which contained the same causes of action in the first amended complaint. However, Tipler's second amended complaint added pages of largely historical information tracing his employment with the City over several years prior to the alleged wrongful acts in August of 2002, and describing the

conflicts between him and his supervisor. The second amended complaint also alleged, for the first time, that Tipler did file with the City a government claim by his letter to the City's city attorney, dated July 13, 2005. Apparently realizing that the notice was not timely and that even if it were timely the action was barred by the statute of limitations, Tipler also alleged that the City should be estopped to assert defenses based on the Government Code and the statute of limitations.

The City again demurred. It argued that Tipler failed to allege he had filed a timely government claim notice, that his claim notice was in fact filed too late, and that even if it was deemed timely filed by operation of law all of Tipler's causes of action were barred by the statute of limitations. Also, the City urged that there was no merit to his estoppel theory.

The trial court sustained the demurrer to the second amended complaint without leave to amend, ordered Tipler's complaint dismissed, and entered a judgment of dismissal against Tipler.

Tipler appeals.

DISCUSSION

Viewing the factual allegations in the second amended complaint in accordance with the customary standard of appellate review following a successful demurrer (see *Philips v. Desert Hospital District* (1989) 49 Cal.3d 699, 702), we find that Tipler's causes of action are barred both by his failure to file a timely government claim notice and by the statutes of limitations.

I. Tipler's government claim notice was not timely and thus bars his lawsuit.

Actions against a public entity, such as the City (see § 811.2), seeking money or damages for negligent or intentional torts must be preceded by presentation to the public entity of a proper government claim within a specified period of time. (§ 905; see *Tietz v. Los Angeles Unified Sch. Dist.* (1965) 238 Cal.App.2d 905, 911.) The time for filing a government claim notice for "injury to person or to personal property" is six months. (§ 911.2, subd. (a).) The time runs from the date of accrual of the cause of action within the meaning of the applicable statute of limitations. (§ 901.)

Moreover, no lawsuit for "money or damages" may be brought against a public entity until a written government claim has been presented to the public entity, and the government claim has either been acted upon or is deemed to have been rejected. (§§ 905, 945.4; see *Hart v. Alameda County* (1999) 76 Cal.App.4th 766, 778.) Compliance with the filing requirement is mandatory, and the failure to present a government claim within six months after the cause of action accrues is fatal to the cause of action. (*Shelton v. Superior Court* (1976) 56 Cal.App.3d 66, 82.) Indeed, if the complaint does not allege that the plaintiff presented a government claim to the public entity within six months after the cause of action accrued, a necessary element of the cause of action is lacking and the complaint is subject to a demurrer. (*Briggs v. Lawrence* (1991) 230 Cal.App.3d 605, 613.)

It is uncontested that Tipler's causes of action required that he file a government claim with the City within six months of the accrual of his causes of action. A cause of action generally accrues and the lawsuit may be filed when the plaintiff incurs injury as a result of the defendant's wrongful act or omission. (*Loehr v. Ventura County Community College Dist.* (1983) 147 Cal.App.3d 1071, 1078.) Here, as indicated in the second amended complaint, all of Tipler's causes of action accrued on August 5, 2002, when purportedly fraudulent documents concerning the facts about his separation from employment were placed in his file. Even reading into the second amended complaint facts found in the original complaint (see *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 384), the latest the causes of action could accrue would be October 5, 2002, when Tipler was advised that his health insurance had been canceled and he was not eligible for benefits under COBRA because the City deemed him terminated for misconduct. Yet, as Tipler alleged in his second amended complaint, it was not until he sent a letter to the City, dated July 13, 2005, that he purportedly complied with the government claim requirement necessary to permit his lawsuit to proceed.

Thus, because Tipler by his own admission filed no government claim with the City until July of 2005, which was more than two years beyond the six-month filing deadline, the trial court properly sustained the demurrer without leave to amend.

II. The content of the City's August 23, 2005, reply to Tipler's government claim notice was not defective under the circumstances, and thus did not waive its defense of an untimely government claim notice.

Tipler attempts to rescue his lawsuit by arguing that the City waived its defense of untimeliness of his July 13, 2005, government claim letter because the City's August 23, 2005, reply to his claim was flawed. The theory is unavailing.

According to Tipler, even if his government claim was not timely, the City's failure to properly respond resulted in the waiver of its defenses regarding any claims filed by him. Specifically, he relies on section 911.3, subdivision (a), which provides that if a government claim is presented after the six-month deadline and without an application to present a late claim (which was the case here), then the public entity "shall" give written notice that because the government claim was not timely filed no action was taken on the claim, and that the "only recourse" is to apply for leave to present a late claim, which under some circumstances may be granted (citing section 911.6). Section 911.3, subdivision (b), provides that "[a]ny defense as to the time limit for presenting a claim described in subdivision (a) is waived by the failure to give the notice set forth in subdivision (a) . . . ."[2]

In the present case, the City's response in its letter of August 23, 2005, did advise Tipler that his government claim notice was late, but it did not advise him that his only recourse was to apply for leave to present a late government claim. However, the City could not truthfully make that representation because the law is otherwise as applied to the circumstances of this case.

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[2] To the extent Tipler argues that the City's failure to properly respond resulted in the waiver of *all* of its defenses regarding any claims filed by him, including the defense of the statute of limitations, he is mistaken. The language of section 911.3, subdivision (b), is not so broad. That statutory provision specifically refers back to 911.3, subdivision (a), which in turn refers to section 911.2, regarding only the six-month time frame for filing a government claim. Section 911.3, subdivision (b), does not refer to and has no application to the general statutes of limitations that time-bar Tipler's various causes of action.

The City could not properly advise Tipler that his only recourse would be to apply for leave to present a late government claim because there is an outer time limit for filing even a late claim, and Tipler's claim was way beyond even that outer time limit. Section 911.4, subdivision (b), provides that any application to file a late government claim must be filed "within a reasonable time not to exceed one year after accrual of the cause of action." (See *Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1779.) Given how late Tipler's July 13, 2005, letter was, he could not even have filed a timely application to file a late government claim.

Thus, there was absolutely no way Tipler could have perfected his government claim, even with an application for late filing, because he was almost two years too late even to apply for late filing. We conclude that the City cannot be deemed to have waived a timeliness defense by its failure, in effect, to misrepresent the law regarding the possibility of the late filing of a government claim. The technically insufficient (but thereby accurate) response by the City does not constitute a waiver of its defense of late filing because the remedial purpose of section 911.3, subdivision (b) (see *Philips v. Desert Hospital District, supra,* 49 Cal.3d at p. 711) cannot be satisfied where another statute (§ 911.4, subd. (b)) absolutely prohibits the possibility of curing the late filing. The cases relied upon by Tipler (e.g., *Philips v. Desert Hospital District*, 3d at p. 711; *Watts v. Valley Medical Center* (1992) 8 Cal.App.4th 1050, 1052, 1055-1056) are distinguishable and inapplicable. Such cases do not involve the restriction on late filing set forth in section 911.4, subdivision (b), a timing restriction that undermines Tipler's position.

III. Even if the content of the City's August 23, 2005, reply to Tipler's government claim notice was defective, Tipler nonetheless failed to file his lawsuit within the period of the statute of limitations.

Moreover, even if the City's response to Tipler's government claim was improper, Tipler still did not file his lawsuit within the period of the statute of limitations, which is two years from the accrual of the causes of action. Pursuant to section 945.6, the claimant must file its lawsuit not later than either six months after a proper notice of

rejection of the government claim is given (§ 945.6, subd. (a)(1)), or "[i]f written notice is not given in accordance with Section 913, within two years from the accrual of the cause of action." (§ 945.6, subd. (a)(2).) Tipler's lawsuit did not comply with either requirement.

Thus, assuming the City's letter of August 23, 2005, complied with section 913, Tipler would have had six months, or at the latest until February 23, 2006, to file his lawsuit. His lawsuit, however, was filed on February 28, 2007, and was more than one year too late.

Alternatively, assuming the City's letter of August 23, 2005, did not comply with section 913, Tipler would have had no more than two years from the accrual of each cause of action (not from the date of the government claim notice) to file a lawsuit setting forth that cause of action. (§ 945.6, subd. (a)(2); see *Mandjik v. Eden Township Hospital Dist.* (1992) 4 Cal.App.4th 1488, 1500-1501.) Tipler's causes of action all accrued in 2002, and thus his 2007 lawsuit is time-barred by section 945.6, subdivision (a)(2).

Even in the absence of section 945, subdivision (a)(2), and its two-year statute of limitations, Tipler's causes of action would all be time-barred by the otherwise applicable statutes of limitations. There is a one-year statute of limitations for Tipler's cause of action for defamation (Code Civ. Proc., § 340), a three-year statute of limitations for the alleged fraud and deceit (Code Civ. Proc., § 338), and a two-year statute of limitations for personal injury actions (Code Civ. Proc., § 335.1), such as Tipler's allegations of intentional infliction of emotion distress, negligence, conspiracy in violation of public policy as to fraudulent termination, and wrongful termination in violation of public policy. Because Tipler's causes of action accrued in 2002 and his complaint was filed in 2007, all the causes of action alleged in the complaint would be time-barred by the above noted statutes of limitations.

IV. <u>There is no merit to Tipler's theory of estoppel.</u>

Tippler premises his theory of estoppel on the allegation that he abandoned his clams against the City in reliance on its letter of August 23, 2005, which stated that the statutes of limitations had run on his claim. Apparently, Tipler urges that because he

abandoned his claims, the City should be estopped from arguing the statute of limitations had actually run on each cause of action.

The doctrine of estoppel involves, in pertinent part, the misrepresentation or concealment of a material fact and reliance by another on that fact. (*Jordan v. City of Sacramento* (2007) 148 Cal.App.4th 1487, 1496.) Here, however, Tipler alleges at most the misrepresentation of a legal conclusion as to whether the statute of limitations had run, not any misrepresentation of fact. (See *Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1152 [insurer's legal conclusions regarding coverage do not create estoppel; there must be a misrepresentation of fact].) Thus, the doctrine of estoppel is inapplicable here.

V. Tipler's equitable tolling argument, based on his workers' compensation claim, is without merit

Tipler contends that by filing a workers' compensation claim (the details of which are not in the record on appeal), he equitably tolled the statute of limitations. "Equitable tolling stops the statute of limitations from expiring when a plaintiff has remedies in addition to [those in] state court. [Citation.] Equitable tolling has three elements. [Citations.] First, timely notice to the defendant of the claim within the statutory period; ordinarily, such notice occurs when the plaintiff files in the other forum. Second, lack of prejudice to the defendant in gathering and preserving evidence for its defense. And, third, the plaintiff's reasonableness and good faith in pursuing the claim in the other forum." (*Mojica v. 4311 Wilshire, LLC* (2005) 131 Cal.App.4th 1069, 1073.) Additionally, the workers' compensation action and the civil action must arise "out of the same accidents" and entail relief sought "for the same injuries." (*Collier v. City of Pasadena* (1983) 142 Cal.App.3d 917, 923, 927 [the injuries were the source of both the workers' compensation claim and the disability pension claim].)

In the present case, however, the causes of action set forth in the second amended complaint—the allegations of defamation, fraud, infliction of emotional distress, wrongful termination in violation of public policy, and conspiracy in violation of public policy—all stem from the City's August 5, 2002, letter and have nothing to do with

Tipler's workers' compensation claim. In fact, Tipler even points out in his opening brief that he filed his workers' compensation claim while he was still employed by the City, and that the allegedly wrongful acts of which he complains in his civil lawsuit all stemmed from conduct by the City that occurred "after [his] employment" ended.

Moreover, the workers' compensation claim is not in the record on appeal, and it is unclear from the appellate record what precisely Tipler's workers' compensation claim was based upon. It is Tipler's burden as the appellant to provide an adequate record sufficient to assess the alleged error. Error is never presumed. Rather, the judgment is presumed correct. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575.)

Accordingly, although the record does not reveal the exact nature of the workers' compensation claim, it could not have been based on the purported wrongful conduct of the City that occurred well after the workers' compensation claim was filed. Therefore, the notion of equitable tolling does not apply and is of no avail to Tipler.[3]

VI. Conclusion.

In sum, all of the causes of action in the second amended complaint are barred by Tipler's failure to file a timely government claim. Also, the statute of limitations ran on all of Tipler's causes of action well before he filed this lawsuit. Therefore, the trial court did not err in sustaining the City's demurrer to the second amended complaint without leave to amend. (See *Kilgore v. Younger* (1982) 30 Cal.3d 770, 783.) The judgment of dismissal was properly entered.

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[3] Finally, Tipler argues at some length that the City violated his absolute right to quit at will. However, Tipler does not directly relate this notion to the trial court's sustaining of the demurrer without leave to amend. "We discuss [only] those arguments that are sufficiently developed to be cognizable." (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19.)

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.